

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In Re: The License of :

Paula J. & Thomas P. Flaherty
12701 Polk Street N.E.
Blaine, Minnesota 55434-3267

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Phyllis A. Reha, Administrative Law Judge, on December 14-15, 1995, February 27-29, 1996, and March 27, 1996, at the Anoka County Courthouse, 325 East Main Street, Anoka, Minnesota, 55303. The record closed on May 13, 1996, upon receipt of the parties post-hearing memoranda.

John R. Speakman, Assistant Anoka County Attorney, Government Center, 2100 Third Avenue, Anoka, Minnesota 55303-2265, appeared on behalf of Anoka County Department of Human Services.

Carole V. Ryden, Esq., 2310 American Bank Building, St. Paul, Minnesota, 55101, appeared on behalf of the License Holders, Paula J. and Thomas P. Flaherty.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact James G. Loving, Director, Licensing Division, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155; telephone 612/296-4473.

STATEMENT OF ISSUES

1. Whether Anoka County met its burden of proof to demonstrate reasonable cause for recommending revocation of the Flahertys' adult foster care license.

2. Whether Paula and Thomas Flaherty have demonstrated, by a preponderance of the evidence, that they were in full compliance with all rules and statutes governing their adult foster care license.

3. Whether police records of the January 5, 1995 incident involving Thomas Flaherty should be excluded as evidence in these proceedings.

4. Whether the adult foster care license may or should be bifurcated.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In March of 1993, the Minnesota Department of Human Services issued a license to Paula J. and Thomas P. Flaherty to provide adult foster care in their home located at 12701 Polk Street N.E., Blaine, Minnesota.

2. The Flahertys' license was issued as license No. 208815 (R203), and is held in the names of both Paula J. and Thomas P. Flaherty.

3. Both Paula and Thomas Flaherty are recovering alcoholics and they disclosed this information to Anoka County during their initial application process.

4. On March 15, 1993, Ms. Lynn Larson, licensing social worker for Anoka County's Adult Foster Care Licensing Division, visited the Flaherty home for the first time in connection with Paula and Thomas Flaherty's adult foster home license application. During this initial visit, Ms. Larson gave the Flahertys a summary of the Vulnerable Adults Act, and a copy of Minnesota Rules, Parts 9555.5105 - 9555.6265 regarding foster care services and licensure of adult foster homes. (Ex. # 10 and 52).

5. In May of 1993, Paula and Thomas Flaherty signed an Adult Foster Home Abuse Prevention Plan given to them by Lynn Larson. The form states that foster care providers "must report any suspected cases of Adult abuse or neglect to the Police Department and/or the Adult Protection Unit of the Anoka County Community Health and Human Services Department. (emphasis theirs) (Ex. # 9).

6. On May 25, 1993, the Flahertys received training regarding foster home provider requirements under the Vulnerable Adults Act.

7. The Flahertys have a pet Great Dane (dog) named Caesar. Caesar suffers from a nervous condition which causes him to bite and chew his front leg. Throughout 1994, veterinarians prescribed valium for Caesar to treat Caesar's nervous condition. The Flahertys stored Caesar's valium in an unlocked cupboard in the kitchen. (Ex. # 23 and 68).

8. Prior to 1995, the Flahertys stored the residents' medications in a lock box in the Flahertys' master bedroom.

9. On May 3, 1994, Paula Flaherty filled out a Home Safety Checklist provided by Lynn Larson. In response to a question regarding the storage of Schedule II narcotics in a locked area, Paula checked the answer "Yes". (Ex. # 12).

10. On June 4, 1994, the Department of Human Services renewed the Flaherty's adult foster care license for the period of June 1, 1994 through June 1, 1995. (Ex. # 8).

11. From November 1, 1994, to June 1, 1995, the Flahertys had four residents living in their home. The initials of these residents are E.L., F.R., J.B., and M.A. All of the residents required 24 hours a day supervision.

12. In November of 1994, E.L. was a 85 year old woman with a diagnosis of Alzheimers. E.L. was unable to ambulate on her own. (Ex. # 46).

13. In November of 1994, F.R. was a 92 year old man with a diagnosis of confusion. At times, F.R. would refuse to eat. F.R. was unable to ambulate on his own. (Ex. # 47).

14. In November of 1994, J.B. was a 67 year old man with a diagnosis of Alzheimers, dementia, and psoriasis. J.B. was unable to ambulate on his own. (Ex. # 48).

15. In November of 1994, M.A. was 65 year old woman with a diagnosis of dementia, diabetes, and incontinence. M.A. was ambulatory. (Ex. # 49).

16. When feeding F.R., Thomas Flaherty would speak loudly in an attempt to get F.R.'s attention and to get F.R. to eat.

17. In November of 1994, Thomas Flaherty purchased a .38 caliber handgun for protection of the residence. Thomas Flaherty kept the handgun loaded and in an unlocked drawer underneath the waterbed in the Flaherty's bedroom. The door to the Flahertys' bedroom was not consistently kept locked.

18. During the time period of November, 1994 to February, 1995, Polly Nouis ("Polly"), a Licensed Practical Nurse, and Judy Perleberg ("Judy"), a Home Healthcare Aide, worked full time at the Flahertys caring for the residents. In addition to other duties, Polly kept notebooks on each of the residents in which she documented the residents' health information.

19. On December 28, 1994, J.B. lost three front teeth when his dental bridgework fell out while eating lunch. J.B. did not indicate that he was experiencing any pain.

20. Paula Flaherty made an appointment for J.B. to see a dentist for January 5, 1995.

21. Between January 1, 1995 through May 31, 1995, Cynthia Hendricks made several visits to the Flahertys' home for the purpose of evaluating the standard of care being provided to the residents.

22. On January 3, 1995, Polly noted in E.L.'s notebook that E.L. had a large lump on her left side that was painful to touch. (Ex. # 53). Both Polly and Judy thought that the protrusion on E.L.'s side may be due to a broken rib.

23. Paula Flaherty did not take E.L. to a doctor to be seen for her raised rib condition. Rather, Paula instructed Polly and Judy to wrap an elastic binding around

E.L.'s raised rib area. A subsequent x-ray of E.L.'s ribs demonstrated no definite fractures. (Ex. # 64).

24. On January 5, 1995, Paula Flaherty was hospitalized at Mercy Hospital for a ruptured appendix. Paula remained in the hospital from January 5, 1995 through January 12, 1995. During this period of time, Paula Flaherty was unable to care for the residents.

25. J.B. was not taken to his dental appointment on January 5, 1995.

26. On January 5, 1995, Thomas Flaherty visited Paula in the hospital. Before leaving for the hospital, Thomas emptied the dog's valium pills into his shirt pocket and placed the empty prescription bottle back on a shelf in the kitchen cupboard. Thomas put an unopened full bottle of the dog's valium inside a shaving kit and placed it on the top shelf of the kitchen cupboard at a height of about 6' 10". Thomas Flaherty also took with him the loaded handgun.

27. After visiting Paula at the hospital on January 5, 1995, Thomas Flaherty stopped at a bar and consumed two to four alcoholic beverages.

28. While driving home from the bar on January 5, 1995, Thomas Flaherty was stopped by a Circle Pines police officer on suspicion of driving under the influence of alcohol. After conducting a field sobriety test, Thomas Flaherty was placed under arrest for driving under the influence. A search incident to the arrest revealed the 65 valium pills in Mr. Flaherty's shirt pocket and the handgun in the car. Mr. Flaherty was taken to the Anoka County jail and later booked on charges of controlled substance crime - 5th degree; possession of a loaded gun in a motor vehicle without a permit; driving under the influence; careless driving; and no proof of insurance. (Ex. # 19).

29. From approximately 8 p.m. on January 5, 1995, to 6:55 a.m. on January 6, 1995, the residents were left in the care of the Flahertys' son, Otto. Otto Flaherty was 19 years old at the time and has had no formal training as a nurse, nursing assistant, or home healthcare aide.

30. On the morning of January 6, 1995, Thomas Flaherty gave two statements to Anoka County police investigator Plattner. (Ex. #s 24 and 25). Thomas Flaherty admitted to taking one or two of his dog's valium pills a day during the first week of January 1995. (Ex. # 25).

31. On the morning of January 6, 1995, Thomas Flaherty called home to his son Otto and requested that Otto pick him up from the Anoka County jail. From approximately 6:55 a.m. to 7:50 a.m., Otto left the four residents alone and unsupervised while he attempted to pick up Thomas Flaherty from jail.

32. On January 6, 1995, at approximately 7:50 a.m., Judy Perleberg arrived for work at the Flahertys' residence. She entered the house through an unlocked door. Judy found the residents alone and unsupervised. Neither Thomas nor Otto Flaherty were in the home, and Paula was recovering from surgery in Mercy Hospital. Judy found a note from Otto on the kitchen table informing Judy and Polly Nouis that he had gone to pick up his father from jail. Judy checked on the residents who were all in their beds. Some of the residents were in bed restraints. At approximately 8:00 a.m., Polly arrived for work at the Flahertys' home. Judy showed Otto's note to Polly and informed

her that the residents had been left alone while Otto went to pick Thomas Flaherty up at the jail.

33. Thomas Flaherty hired an attorney to represent him on the criminal charges stemming from the January 5, 1995 incident. The attorney, Mr. Timothy Ostroot, advised Mr. Flaherty not to speak to anyone about the incident.

34. On three separate evenings subsequent to January 5, 1995, Thomas Flaherty consumed alcoholic beverages.

35. On January 11, 1995, Judy informed Paula Flaherty by telephone that Thomas Flaherty had been arrested for driving under the influence.

36. On January 11, 1995, Paula Flaherty informed the nursing staff at Mercy Hospital that she did not want to see her husband because he had been drinking. Paula also stated that she was considering commitment of Thomas Flaherty to a facility for chemical dependency treatment. (Ex. #67).

37. On January 12, 1995, Paula Flaherty was discharged from Mercy Hospital.

38. Upon Paula's discharge from the hospital, neither Paula nor Thomas Flaherty reported Thomas Flaherty's arrest for driving under the influence or his alcohol relapse to Lynn Larson or Cynthia Hendricks.

39. In January of 1995, the Flahertys began storing the residents' medications in a locked cabinet in their office.

40. On January 13, 1995, Polly and Judy informed Paula that they found a large bruise on F.R.'s side. Neither Polly nor Judy knew what caused F.R.'s bruise. Paula told Polly to document F.R.'s bruise in his notebook. Polly did not document the bruise in F.R.'s notebook. Paula Flaherty did not report F.R.'s bruise to Mary Gargaro, Anoka County Adult Protection social worker and Vulnerable Adults investigator.

41. On January 20, 1995, E.L. was seen by a physician's assistant at her doctor's clinic for a non-productive cough and possible bronchitis.

42. On January 23, 1995, Thomas Flaherty entered a treatment program at Riverplace Counseling Center in Anoka, Minnesota. Mr. Flaherty was discharged on February 27, 1995. (Ex. # 20).

43. In February of 1995, the Flahertys hired David Strigel ("David") to help care for the residents at night.

44. In February of 1995, Judy Perleberg quit her employment with the Flahertys, after the Flahertys cut her work hours to four a day.

45. On February 8, 1995, E.L. was seen by Dr. Rusin for a high fever.

46. Paula Flaherty rescheduled J.B.'s missed dental appointment for May 1, 1995. The delay in scheduling the appointment was due in part to the dentist's vacation plans.

47. On February 28, 1995, Lynn Larson visited the Flaherty home. Neither Thomas nor Paula Flaherty disclosed to Ms. Larson Thomas Flaherty's recent arrest for driving under the influence, his alcohol relapse, and/or his subsequent treatment.

48. On April 15, 1995, Cynthia Hendricks filled out positive adult foster home evaluations for Paula and Thomas Flaherty regarding the care they provided to residents E.L., J.B., and F.R. Neither Thomas nor Paula Flaherty disclosed to Ms. Hendricks Thomas Flaherty's recent arrest for driving under the influence, his alcohol relapse, and/or his subsequent treatment. (Ex. # 56-58).

49. On April 22, 1995, Polly Nouis quit her employment with the Flahertys.

50. In May of 1995, J.B. saw a dentist for his three missing teeth. The dentist was unable to do anything for J.B. and referred J.B. to an oral surgeon. The oral surgeon examined J.B. and recommended no special treatment.

51. On May 16, 1995, Lynn Larson again visited the Flaherty home. During this visit, Thomas Flaherty filled out and signed a "Provider Update" form. In response to the first question on the form asking for a description of any changes, Thomas Flaherty wrote: "Otto moved out, Polly Nouis quite (sic), David Strigel awake night person." (Ex. # 15). Nowhere on the form did the Flahertys disclose Thomas Flaherty's arrest for driving while under the influence, his alcohol relapse, and/or his subsequent treatment.

52. At no time during the visits of either Lynn Larson or Cynthia Hendricks to the Flahertys' home, or on any other occasion during the period January 6, 1995 through May 31, 1995, did the Flahertys disclose Thomas Flaherty's arrest for driving under the influence or his alcohol relapse.

53. On May 23, 1995, Cynthia Hendricks received an anonymous letter detailing certain problems at the Flahertys' home and alleging specific acts of abuse and/or neglect. Included in the allegations were an unreported bruise on F.R.; lack of medical attention for an alleged broken rib of E.L.; lack of medical attention for J.B.'s broken teeth; Thomas Flaherty's use of alcohol and controlled substances; Thomas Flaherty's arrest for driving under the influence of alcohol; and Thomas Flaherty's failure to provide supervision of the residents on January 6, 1995. (Ex. # 17). The allegations contained in the anonymous letter were treated as an incident report and were immediately reported to Mary Gargaro.

54. Anoka County investigated the allegations contained in the anonymous letter. On June 1, 1995, Mary Gargaro, Lynn Larson, and Cynthia Hendricks visited the Flaherty home. Ms. Hendricks was the placing social worker for the four residents in the Flaherty home. In the presence of Ms. Larson and Ms. Hendricks, Ms. Gargaro interviewed Paula Flaherty, Thomas Flaherty, and two of the residents. (Ex. #s 35, 36, 42, 43). Ms. Larson made a record of the interviews in a typed summary which was attached to and made a part of the incident report. (Ex. # 17).

55. On June 5-8, 1995, Mary Gargaro conducted additional interviews with Otto Flaherty, Polly Nouis, and Judy Perleberg (Ex. #s 37-39). Ms. Gargaro also conducted follow-up interviews with Paula and Thomas Flaherty on June 9, 1995. (Ex. # 44).

56. On June 19, 1995, Cynthia Hendricks filled out Abuse Prevention Plan Assessment forms on each of the four residents in the Flaherty home. On each form, Ms. Hendricks specifically instructed that the Flahertys and/or their staff to report bruises, injuries, hospitalizations, medical emergencies, and abuse. (Ex. #s 30-33).

This reporting requirement was not specifically written out on any of the residents' prior Abuse Prevention Assessment forms from 1993 and 1994.

57. On June 19, 1995, Mary Gargaro sent a letter to Thomas and Paula Flaherty summarizing the results of Anoka County's investigation. Ms. Gargaro stated in the letter that the following allegations were substantiated: neglect of medical care for two residents; neglect of supervision for all residents; verbal abuse of one resident; and neglect of all residents by keeping a loaded gun and valium where residents have access. (Ex. # 45).

58. On June 19-21, 1995, Mary Gargaro completed vulnerable adult investigative reports on each of the four residents in the Flaherty home. (Ex. #s 46-49).

59. On June 23, 1995, the Anoka County Adult Foster Care Licensing Division, by Lynn Larson, recommended to the Minnesota Department of Human Services that the adult foster care license of Paula and Thomas Flaherty be revoked. The Flahertys were copied on this letter. (Ex. # 21).

60. On August 8, 1995, the Minnesota Department of Human Services sent the Flahertys a notice that their license had been revoked. In addition to Anoka County's substantiated allegations, the Department cited non-compliance with the rules requiring applicants to update their "social history" information and the rules requiring caregivers to report any suspected abuse or neglect of residents pursuant to the Vulnerable Adults Act. (Ex. # 1).

61. On August 14, 1995, the Flahertys, through their counsel, notified the Department of Human Services of their decision to appeal the Department's revocation of their license. (Ex. # 2).

62. On or about August 22, 1995, the Department of Human Services served the Flahertys with a Notice of and Order for Hearing. (Ex. #3).

63. A contested case hearing was scheduled for October 25, 1995.

64. In October of 1995, Paula J. Flaherty suffered a heart attack and required hospitalization.

65. The contested case matter was rescheduled for December 14 and 15, 1995. The hearing continued on February 27-29, 1996, and ended on March 27, 1996.

66. Otto Flaherty was not available to testify at the hearing.

67. On May 13, 1996, the record closed upon the receipt of the parties' post-hearing memoranda.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. Pursuant to Minn. Stat. § 245A.07, Subd. 3, the Commissioner may suspend, revoke, or make probationary a license if a license holder fails to comply fully with the applicable laws and rules. When applying sanctions authorized under this section, the Commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program. Minn. Stat. § 245A.07, Subd. 1.

4. Pursuant to Minn. Stat. § 245A.08, Subd. 3, the Local Agency (Anoka County) has the burden of proof to demonstrate that reasonable cause existed for the revocation of the License Holders' adult foster care license. When such a showing is made, the burden of proof shifts to the License Holders to demonstrate by a preponderance of the evidence that they were in full compliance with the laws and rules that the Commissioner alleges were violated.

5. Minn. Rules, pt. 9555.5105, Subp. 37, defines supervision as "(A) oversight by a caregiver as specified in the individual resident placement agreement and daily awareness of a resident's needs and activities; and (B) the presence of a caregiver in the residence during normal sleeping hours."

6. Minn. Rules, pt. 9555.6125, Subp. 3B, requires applicants to provide social history information to the Commissioner about each household member. "Social history information" means information on education; employment; financial condition; military service; marital history; strengths and weaknesses of household relationships; mental illness; chemical dependency; hospitalizations; ... felony, gross misdemeanor, or misdemeanor convictions, arrests or admissions; and substantiated reports of neglect or abuse."

7. Minn. Rules, pt. 9555.6125, Subp. 4G, provides that caregivers and household members must not abuse prescription drugs or use controlled substances as named in Minnesota Statutes, chapter 152, or alcohol, to the extent that the use or abuse has or may have a negative effect on the health, rights, or safety of residents.

8. Minn. Rules, pt. 9555.6175, Subp. 2, requires caregivers to immediately report any suspected abuse or neglect of a resident to the commissioner, local agency, local police, or county sheriff as required by the Vulnerable Adults Act.

9. Minn. Rules, pt. 9555.6195, Subp. 1, requires that operators ensure that residents are protected from abuse and neglect through compliance with the Vulnerable Adults Act.

10. Minn. Rules, pt. 9555.6225, Subp. 9, requires that Schedule II controlled substances in the residence that are named in Minnesota Statutes § 152.02, subdivision 3, be stored in a locked storage area permitting access only by residents and caregivers authorized to administer the medication as named in subpart 8.

11. Minn. Rules, pt. 9555.6225, Subp. 10, requires that weapons and ammunition be stored separately in locked areas that are inaccessible to residents and prevent contents from being visible to residents.

12. Anoka County has advanced evidence establishing reasonable cause to believe that the Flahertys engaged in violations of the rules and statutes governing their adult foster care license. Specifically, Anoka County has established reasonable cause

to believe the Flahertys neglected medical care of two residents; neglected supervision of all the residents; verbally abused one resident; neglected all four residents by maintaining a loaded gun in an unlocked area; neglected all four residents by maintaining controlled substances in an unlocked area; failed to report suspected abuse or neglect of a resident pursuant to the Vulnerable Adults Act; and failed to update their social history information regarding Thomas Flaherty's arrest for driving under the influence and alcohol relapse.

13. The Flahertys have failed demonstrate by a preponderance of the evidence that they are in full compliance with the rules and statutes governing their adult foster care license. The Flahertys have shown by a preponderance of the evidence that they did not neglect medical care for two residents, did not verbally abuse one resident, and did not fail to report suspected abuse or neglect pursuant to the Vulnerable Adults Act. However, the Flahertys have failed to show by a preponderance of the evidence that they did not neglect supervision of all the residents and that they did not fail to update their social history information.

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

1. That the License Holders' motion to dismiss the allegations be DENIED.
2. That the License Holders' motion to bifurcate the license be DENIED.
3. That the License Holders' motion to exclude the police records as evidence be DENIED.
4. That the Commissioner of Human Services revoke the adult foster care home license of Paula J. and Thomas P. Flaherty.

Dated this _____ day of June, 1996

PHYLLIS A. REHA
Administrative Law Judge

Reported: Taped (19 Tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

On August 8, 1995, the Minnesota Department of Human Services ("Department") sent Paula and Thomas Flaherty a letter notifying them that their license to provide adult foster care had been revoked. (Ex. # 1) The Department's decision to revoke the Flahertys' license was based upon the recommendation of Anoka County Department of Human Services ("Anoka County"). Anoka County, as the Local Agency, had informed the Department that it had substantiated the following allegations against the Flahertys: neglect of medical care for two residents; neglect of supervision for all residents; verbal abuse of one resident; and neglect of all residents for keeping a loaded gun and valium where residents have access. (Ex. # 21). Along with these allegations the Department cited non-compliance with the rules requiring applicants to update their "social history" information, and non-compliance with the rules requiring caregivers to report any suspected abuse or neglect of residents pursuant to the Vulnerable Adults Act. (Ex. # 1).

On August 14, 1995, the Flahertys, through their counsel, notified the Department of Human Services of their decision to appeal the Department's revocation of their license. A contested case hearing was held on December 14-5, 1995. The hearing continued on February 27-29, 1996, and ended on March 27, 1996. The record in this matter closed on May 13, 1996.

As a preliminary matter, the Flahertys have brought a motion to dismiss the allegations and to award attorney fees based on insufficient notice and alleged discovery violations. The Flahertys argue that the Department and Anoka County failed to provide them with adequate notice of the basis for the revocation decision. Specifically, the Flahertys maintain that Anoka County and the Department did not provide enough information regarding the medical neglect allegations for the Flahertys to determine what incidents constituted medical neglect. Anoka County's letter of June 19, 1995, lists as one of the substantiated allegations, "neglect of medical care for two residents." However, according to the Flahertys, only allegations regarding E.L.'s "bruise of unknown origin" were mentioned. Therefore, the Flahertys maintain that they had no idea which other resident was involved in the medical neglect charge, or what inappropriate behavior was alleged. Likewise, the Department's August 8, 1995 notice cites neglect of medical care for two residents as one of the reasons for the revocation decision. However, in the summary paragraphs of the Department's notice, only E.L.'s alleged broken rib and F.R.'s bruise are mentioned. The Flahertys maintain that the notices provided by both the Department and Anoka County lacked the necessary specificity to allow the Flahertys to prepare for and defend against the allegations. Therefore, the Flahertys seek dismissal of all the allegations brought against them.

The Flahertys also seek dismissal of the charges against them due to Anoka County's alleged discovery violations. On October 10, 1995, the Flahertys served discovery demands on Anoka County. Among their requests, the Flahertys sought all documents relating to the allegations. (Affidavit of Carol Ryden, Exhibit D). On October 19, 1995, Anoka County served its answers and documents in response to the Flahertys' discovery request. Anoka County failed, however, to provide three positive evaluations of the Flaherty home written in April of 1995 by Anoka County's placing social worker, Cynthia Hendricks. The Flahertys were able to obtain these documents on their own, and on October 27, 1995, included the evaluations in the list of documents

they intended to introduce at the hearing. However, the Flahertys point out that had they not located these documents on their own, they would not have had an opportunity to present this evidence in their defense. According to the Flahertys, this information was exculpatory and very important to their defense.

Minn. Rules, pt. 1400.6700, Subp. 1B, states that: "Any party unreasonably failing upon demand to make disclosure required by this subpart may, in the discretion of the judge, be foreclosed from presenting any evidence at the hearing through witnesses not disclosed or through witnesses whose statements are not disclosed." Based on this Rule, the Flahertys move the judge to strike all testimony of Lynn Larson and Cynthia Hendricks from these proceedings. The Flahertys maintain that Anoka County's discovery violation was serious and deserves such a sanction. The Flahertys also argue that absent Ms. Larson's and Ms. Hendrick's testimony, Anoka County cannot meet its burden of establishing reasonable cause to believe the Flahertys were not in compliance with all the rules and statutes governing their license. Therefore, the Flahertys maintain that the allegations should be dismissed in their entirety.

In response to the Flahertys' motion to dismiss, Anoka County argues that the notice of revocation provided to the Flahertys was adequate and that all of the requirements for the notice were met. Pursuant to the Minn. Rules, pt. 1400.5600, Subp. 2(D), proper notice must include, *inter alia*, "[a] statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case." In addition, Minn. Stat. § 245A.07, Subd. 3, requires that a notice of revocation of an adult foster care license state the reasons for the revocation. Anoka County maintains that it and the Department properly notified the Flahertys as to the reasons for the revocation of their adult foster care license and to the relevant statutes and rules allegedly violated.

In fact, Anoka County points out that the Flahertys were notified on three separate occasions as to the reasons for their license revocation. First, on June 19, 1995, Mary Gargaro of Anoka County Adult Protection notified the Flahertys as to the substantiated allegations of abuse and neglect against them. (Ex. #45). Next, the Flahertys were copied on Anoka County licensing social worker Lynn Larson's letter to the Commissioner of Human Services recommending the revocation of the Flahertys' license and explaining the reasons for the recommendation. (Ex. # 21). Finally, on August 8, 1995, the Department notified the Flahertys that their license was being revoked. The Department listed the various rules and statutes that the Flahertys were alleged to have violated, and summarized the reasons for the revocation. (Ex. # 1).

Anoka County asserts that, contrary to the Flahertys' claim, Mary Gargaro did mention the medical neglect of both E.L. and J.B. in her June 19, 1995 letter summarizing the substantiated allegations against the Flahertys. Ms. Gargaro states: "After completing an investigation regarding neglect of medical care of E.L., M.A., and J.B., ... my investigation has revealed the following:

- Resident J.B. did not receive medical intervention in a timely manner.
- Resident E.L. did not receive appropriate medical care for an injury.
- Resident M.A. did receive appropriate medical attention.
- Resident F.R. has a bruise of unknown origin.
- Resident E.L. has a bruise of unknown origin."

Ms. Gargaro concluded that: "The allegations of neglect of medical care for two residents are found to be substantiated." (Ex. # 45). Anoka County asserts that it is clear from Ms. Gargaro's letter that the two substantiated medical neglect allegations at issue concern J.B. and E.L..

The Department's August 8, 1995 notice of revocation incorporated by reference Anoka County's June 19, 1995 letter as the basis for its revocation decision. Anoka County maintains that the Department's August 8, 1995 notice along with Anoka County's June 19, 1995 summary, provided the Flahertys with sufficient information as to the reasons for their license revocation. Furthermore, Anoka County points out that the license holders were on constructive notice of the specific charges alleged against them because of the nature of the investigatory process. The Flahertys only had four residents in their care during the relevant time period. Both Paula and Thomas Flaherty were interviewed more than once and asked questions directly concerning the alleged medical neglect of J.B.'s teeth and E.L.'s ribs. Given the focus of the questions, Anoka County insists that the Flahertys were well aware of the nature of the allegations. According to Anoka County, it is disingenuous for the Flahertys to maintain that without a more detailed notice they were unable to determine the nature of the medical neglect charges against them.

With respect to the alleged discovery violations, Anoka County explains that it omitted the positive home evaluations in its initial discovery response because it knew that Cynthia Hendricks had provided the Flahertys with copies of the evaluations in May of 1995. In fact, approximately one week after Anoka County provided its discovery to the Flahertys, the Flahertys indicated on their document list that they had copies of the evaluations and that they were planning on introducing them at the hearing. Anoka County admits that it made an omission in not providing the evaluations in its initial discovery responses of October 19, 1995. However, Anoka County argues that the Flahertys were in no way prejudiced by this oversight. Without any evidence of surprise or prejudice on the part of the Flahertys, Anoka County maintains that sanctions are not warranted.

After considering the arguments of counsel, the Administrative Law Judge finds that Anoka County and the Department did provide the Flahertys with adequate notification as to the reasons for the revocation of their adult foster care license. The Flahertys received notice from both Anoka County and the Department as to the general allegations against them, along with citations to the corresponding rules and statutes allegedly violated. Upon receiving the notices, the Flahertys had sufficient time and opportunity to respond to the allegations. The judge notes that it is only the charges of medical neglect that the Flahertys claim lacked sufficient specificity. While both Anoka County and the Department's notices could have been written in a more clear and detailed manner, the information provided was not so lacking in specificity as to have deprived the Flahertys of their due process right to adequate notice. Therefore, the Flahertys' motion to dismiss the allegations based on insufficient notice and their motion for attorneys' fees are denied.

In addition, the Flahertys' motion to strike the testimony of Cynthia Hendricks and Lynn Larson as a sanction for Anoka County's omission in not providing Ms. Hendrick's evaluations in its initial discovery response is denied. In claims of discovery violations,

the significant question is whether the discovery omission had a prejudicial effect. Sudheimer v. Sudheimer, 372 N.W.2d 792, 794 (Minn. App. 1985). The Flahertys have failed to show how they were prejudiced by the discovery omission of Anoka County beyond mere speculation as to what might have happened had the Flahertys not kept their own copies of the positive evaluations. The Flahertys not only had the evaluations in their possession, they demonstrated their awareness of the evaluations by including them in the list of documents to be introduced at the hearing. Because Anoka County's omission did not affect the substantial rights of the Flahertys, the Flahertys' motion to strike the testimony of Anoka County social workers Lynn Larson and Cynthia Hendricks is denied.

Finally, the Flahertys have made a motion to exclude from evidence the police records regarding Thomas Flaherty's January 5, 1995 "incident". As stated at the hearing, the judge has determined that the evidence regarding Mr. Flaherty's stop by the Circle Pines police and eventual arrest for driving under the influence is relevant to the issue of Mr. Flaherty's ability to provide appropriate 24 hour care and supervision for the residents. Mr. Flaherty's detention in the Anoka County jail is a direct result of his alcohol relapse, and in turn was a causative factor in the residents being left unsupervised for approximately one hour on the morning of January 6, 1995. The subsequent statements Thomas Flaherty gave to the police investigator are relevant in so far as they go to the issue of Thomas Flaherty's potential abuse of alcohol and controlled substances, and his ability to adequately supervise the residents. Therefore, the Flahertys' motion to exclude from evidence the police records regarding Thomas Flaherty's January 5, 1995 incident is denied.

After weighing all the evidence presented at the hearing, the Administrative Law Judge finds that Anoka County has demonstrated that it had reasonable cause to believe the Flahertys engaged in violations of the rules and statutes governing their adult foster care license. Specifically, Anoka County has established reasonable cause to believe the Flahertys neglected medical care for two residents (J.B. and E.L.); neglected supervision of all four residents by leaving them unattended on the morning of January 6, 1996; verbally abused one resident (F.R.); neglected all four residents by maintaining a loaded gun and controlled substances in unlocked areas; failed to report suspected abuse or neglect of the residents pursuant to the Vulnerable Adults Act; and failed to update their "social history" information with respect to Thomas Flaherty's alcohol relapse and arrest for driving under the influence.

The Administrative Law Judge finds that Paula and Thomas Flaherty did fully comply with the rules and statutes governing their adult foster care license with respect to the provision of medical attention for the residents, the prohibition against verbal abuse, and the requirement to report any suspected abuse or neglect pursuant to the Vulnerable Adults Act. Through testimony and documentary evidence the Flahertys established by a preponderance of the evidence that they did not neglect medical attention for either E.L. or J.B. The medical neglect allegation for E.L. was based on the mistaken belief that E.L. had a broken rib in January of 1995. Evidence introduced at trial by the Flahertys established that E.L. did not have a broken rib. (Ex. # 64). The Flahertys decision not to take E.L. to a doctor, and to instead wrap an elastic bandage around the raised area on E.L.'s side is not enough to substantiate a medical neglect

allegation. Furthermore, E.L. was seen at her doctor's office on January 20, 1995 for possible bronchitis. Had her lump or raised rib area required medical attention, the physician's assistant would have presumably addressed it at that time. Therefore, the Administrative Law Judge finds that the Flahertys did fully comply with the rules and statutes regarding the provision of medical care for E.L.

The medical neglect allegation for J.B. concerns the alleged delay in providing dental care to J.B. after his dental bridgework fell out on December 28, 1994. The evidence demonstrated that Paula Flaherty, upon learning that J.B. had lost three teeth, promptly scheduled a dental appointment for J.B. for January 5, 1995. Due to her own medical emergency, Paula Flaherty was unable to take J.B. to this appointment. Paula Flaherty did not schedule another appointment until May 1, 1995, due in part to the dentist's vacation plans. However, J.B. did not indicate that he was experiencing any pain, nor did he exhibit difficulty eating. J.B.'s wife, who visited J.B. two or three times a week, testified that in her opinion J.B. was not in pain. J.B.'s wife also testified that had she felt J.B.'s teeth required more immediate medical attention, she would have arranged to take J.B. to a dentist on her own. Furthermore, once J.B. was seen by the dentist, the dentist advised that he was unable to do anything for J.B., and referred J.B. to an oral surgeon. The oral surgeon also recommended no special treatment for J.B. beyond providing J.B. with softer foods. The Administrative Law Judge finds that the Flahertys have demonstrated by a preponderance of the evidence that they did not neglect medical care for J.B.

The Flahertys also sufficiently demonstrated that they did not verbally abuse F.R. Minn. Rules, pt. 9555.6195, Subp. 1, requires that operators ensure that residents are protected from abuse and neglect through compliance with the Vulnerable Adults Act. The evidence indicated that at times F.R. would close his eyes and refuse to eat. On these occasions, Thomas Flaherty would speak loudly to F.R. to get his attention and to attempt to get him to eat. The Administrative Law Judge finds that such behavior on Thomas Flaherty's part, without more, does not rise to the level of verbal abuse. Therefore, the Flahertys have demonstrated by a preponderance of the evidence that they were in full compliance with Minn. Rules, pt. 9555.6195, Subp. 1, and all other rules and statutes governing their license with respect to the allegation of verbal abuse of F.R.

Finally Anoka County and the Department alleged that the Flahertys violated Minn. Rules, pt. 9555.6175, Subp. 2, by failing to report F.R.'s bruise. Minn. Rules, pt. 9555.6175, Subp. 2, requires caregivers to immediately report any suspected abuse or neglect of a resident. The evidence presented at the hearing was inconclusive as to the likely cause of F.R.'s bruise. The Flahertys maintain that they did not suspect that F.R.'s bruise was caused by abuse or neglect. Rather, the Flahertys believe that F.R.'s bruise may have been caused by F.R.'s repetitive motion in leaning over his wheelchair to pick up imaginary objects. The Flahertys argue that because they did not suspect abuse or neglect, they were not obligated under the Vulnerable Adults Act to report F.R.'s bruise. Based on the inconclusive evidence presented at the hearing regarding the cause of F.R.'s bruise, the Administrative Law Judge finds that the Flahertys did not fail to comply with the reporting requirements of Minn. Rules, pt. 9555.6175, Subp. 2.

However, the Administrative Law Judge finds that the Flahertys have failed to show by a preponderance of the evidence that they complied with the rules and statutes governing their adult foster care license with respect to the supervision of the residents, and the requirement to report changes in their "social history". Thomas Flaherty admitted that he kept a loaded .38 caliber handgun in an unlocked drawer under the waterbed in the Flahertys' master bedroom. The evidence presented at the hearing also indicates that the door to the master bedroom was often left unlocked. Pursuant to Minn. Rules, pt. 9555.6225, subp. 10, weapons and ammunition are required to be stored separately in locked areas that are inaccessible to residents. The majority of the residents inability to ambulate without assistance, does not alter the fact that Thomas Flaherty's storage of a loaded handgun in an unlocked area violates Minn. Rules, pt. 9555.6225, subp. 10. Likewise, the Flahertys admitted to keeping valium in an unlocked kitchen cupboard. Minn. Rules, pt. 9555.6225, Subp. 9, requires Schedule II controlled substances to be kept in a locked storage area. Therefore, the Administrative Law Judge finds that the Flahertys failed to comply with both Minn. Rules, pt. 9555.6225, Subps. 9 and 10.

Most significantly, the evidence presented at the hearing demonstrated that on the morning of January 6, 1995, from approximately 6:55 a.m. to 7:50 a.m., the Flahertys left the four residents alone and unsupervised. The evidence established that Otto Flaherty, who had been alone with the residents all night, left the home at 6:55 a.m. to pick Thomas Flaherty up from jail. Paula Flaherty remained at Mercy hospital, where she had been admitted the previous day for a ruptured appendix. All four residents were in their beds without supervision when Judy Perleberg arrived for work at approximately 7:50 a.m. Some of the residents were in bed restraints. Minn. Rules, pt. 9555.5105, Subp. 37, defines "supervision" as (A) oversight by a caregiver as specified in the individual resident placement agreement and daily awareness of a resident's needs and activities; and (B) the presence of a caregiver in the residence during normal sleeping hours." The Administrative Law Judge finds that the Flahertys failed to comply with the rules and statutes regarding the provision of supervision and protection of the residents. The neglect of supervision of all the residents on January 6, 1995, is a very serious violation of the rules and statutes governing the Flahertys adult foster care license, and it alone warrants revocation of the Flahertys' license.

Finally, the Administrative Law Judge finds that the Flahertys failed to comply with Minn. Rules, pt. 9555.6125, Subp. 3B, which requires applicants to update their "social history" information including changes in chemical dependency status and any misdemeanor or gross misdemeanor arrests. On the evening of January 5, 1995, Thomas Flaherty, a recovering alcoholic, consumed approximately two to four alcoholic beverages at a local bar. Later that evening, Thomas Flaherty was stopped by a Circle Pines police officer on suspicion of driving while under the influence. After conducting a field sobriety test, the Circle Pines police officer placed Thomas Flaherty under arrest and transported him to the Anoka County jail. As a result of this incident, Thomas Flaherty entered a chemical dependency treatment program at Riverplace Counseling Center in Anoka, Minnesota.

The evidence at the hearing established that the Flahertys failed to disclose to either Lynn Larson or Cynthia Hendricks Thomas Flaherty's alcohol relapse, his arrest

for driving under the influence, and his subsequent chemical dependency treatment. This, despite the fact that both Lynn Larson and Cynthia Hendricks made several visits to the Flaherty home between January 1, 1995 and May 31, 1995. On May 16, 1995, Lynn Larson visited the Flaherty home and gave Thomas Flaherty a "Provider Update" form to fill out in connection with the Flahertys' license renewal. In response to the first question on the form asking for a description of any changes, Thomas Flaherty wrote: "Otto moved out, Polly Nouis quite (sic), David Strigel awake night person." (Ex. # 15). Nowhere on the form did the Flahertys disclose Thomas Flaherty's arrest for driving while under the influence, his alcohol relapse, and/or his subsequent treatment. Therefore, the Administrative Law Judge finds that the Flahertys failed to comply with Minn. Rules, pt. 9555.6125, Subp. 3B, requiring applicants to update their social history information.

Weighing all of the evidence presented at the hearing the Administrative Law Judge finds that Anoka County has met its burden of proof to demonstrate reasonable cause for recommending revocation of the Flahertys' adult foster care license. Anoka County received credible allegations of abuse and neglect on the part of Paula and Thomas Flaherty. Paula Flaherty and Thomas Flaherty have failed to meet their burden of proof by a preponderance of the evidence that they were in full compliance with all the rules and statutes governing their license. Rather, the evidence supports the allegations of neglect of supervision of all the residents by leaving the residents alone and unattended for approximately one hour on the morning of January 6, 1995. In addition, the evidence established that the Flahertys neglected supervision of the residents by maintaining a loaded gun in an unlocked drawer and valium in an unlocked cupboard where the residents had access. Finally, the record demonstrated that the Flahertys failed to update their "social history" information with respect to Thomas Flaherty's January 5, 1995 arrest for driving under the influence and alcohol relapse.

Paula Flaherty has brought a motion to bifurcate the license. Paula Flaherty argues that she and Thomas Flaherty should be seen as separate and distinct co-licensees, and that any recommended negative action should be taken only against the non-compliant licensee. That is, Ms. Flaherty maintains that even if the Commissioner determines that Thomas Flaherty violated certain rules and statutes governing the adult foster care license, Paula as the complying or "innocent" licensee, should be allowed to continue to operate under the license. The Administrative Law Judge does not find Ms. Flaherty's argument to be persuasive. Rather, the Administrative Law Judge agrees with Anoka County that the adult foster care license under discussion was issued to both Paula and Thomas Flaherty, and should not be bifurcated. Both Paula and Thomas Flaherty are considered the "license holder", and both were responsible for ensuring compliance with all the rules and statutes governing adult foster care homes. Any negative action taken by the Commissioner will be taken against the license, and not against an individual license holder. See, the decision of the Commissioner of the Department of Human Services in Immediate Suspension of the Day Care License of Dexter Perkins and Carol Davis, OAH No. 66-1800-8758-2.

In addition, the Administrative Law Judge does not find Paula Flaherty to be an "innocent" licensee. While the abandonment of the residents on January 6, 1995, was outside of Paula Flaherty's control, Ms. Flaherty was as responsible as Thomas

Flaherty to report changes in Mr. Flaherty's chemical dependency status to Anoka County. The evidence indicates that Paula Flaherty was aware of Thomas Flaherty's alcohol relapse and arrest for driving under the influence at least as early as January 11, 1995. Between January 11, 1995 and May 31, 1995, Paula Flaherty did not disclose Thomas Flaherty's alcohol relapse and arrest to either Lynn Larson or Cynthia Hendricks. By failing to disclose Thomas Flaherty's behavior, Paula Flaherty violated Minn. Rules, pt. 9555.6125, Subp. 3B. The Administrative Law Judge also notes that Paula Flaherty adamantly maintained throughout this proceeding that she did not know Thomas Flaherty had purchased a gun and kept it loaded in an unlocked drawer under their bed. Ms. Flaherty's insistence that she was unaware of Thomas Flaherty's inappropriate and dangerous behavior is very troublesome. If Paula Flaherty is as unaware of her husband's dangerous behavior as she maintains, she cannot assure future compliance with the governing rules and statutes so long as Thomas Flaherty remains living in her household. Were the Commissioner to bifurcate the Flahertys' license with Thomas Flaherty remaining in the house, there would be no assurance that Paula Flaherty could safeguard the residents against Thomas Flaherty's inappropriate behavior. Having failed once to report Thomas Flaherty's behavior pursuant to Minn. Rules, pt. 9555.6125, Subp. 3B, Paula Flaherty's guarantee that she would do so in the future is not very credible. Therefore, Paula Flaherty's motion to bifurcate the adult foster care home license is denied.

Based on the violations of the rules and statutes cited above, the Administrative Law Judge recommends that the adult foster care license of Paula J. and Thomas P. Flaherty be revoked.

P.A.R.